Public Health and the Law

Making Babies without Sex: The Law and the Profits

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Nineteen eighty-four witnessed significant scientific and societal developments in non-coital human reproduction. On the scientific side, the year saw the first birth from surrogate embryo transfer (SET),[1] and the first birth using a frozen embryo.[2] On the societal side, the year saw reports by government-appointed public panels on non-coital reproduction in England (the Warnock Report)[3] and Australia (the Waller Report)[4] and Congressional hearings on the subject in the United States.[5]

Techniques for creating children without sex close a circle opened by effective contraception which made sex without reproduction dependable. Society seems as supportive of the new techniques to create children as it was of contraception, but more anxious about the implications these techniques raise, and consequently more interested in public regulation of them. The major argument in favor of the techniques—which include artificial insemination by donor (AID), *in vitro* fertilization (IVF), use of surrogate mothers, surrogate embryo transfer, and frozen embryos—is the resulting children. Their pictures have appeared in newspapers and magazines around the world, and *People* magazine even named the world's first IVF child, Louise Brown, one of the 10 most prominent people of the decade.[6]

Ambivalence toward Non-coital Reproduction

Ambivalence, however, is apparent in the language used to describe the new techniques in various countries. In Australia, they are sometimes referred to as methods of "abnormal" reproduction;[7] in England as "unnatural" reproduction[8]; and in the United States the preferred term is "artificial" reproduction.[5] The policy problem raised by these techniques is how to deal effectively "with a series of sequential challenges" to current clinical practices.[9] I have argued elsewhere that while we may have to wait for some time to develop a coherent social policy on artificial reproduction, it is time that we took action on two fronts: defining parenthood, and restricting the commercialization of child bearing.[10]

The use of donor eggs and SET raise for the first time the situation in which the genetic mother and the gestational mother will not be the same person.[11] In this situation it is critical for protection of both the mother and child that the legal mother, the person with the rights and responsibilities of parenthood toward the child, be identifiable at the time of birth. Given the need for certainty and the biological and psychological interests of the gestational mother in the child, I believe that the gestational mother should be considered the child's legal mother for all purposes.[5,10] This is currently the law in the State of Victoria, Australia, and should be clarified in the United States, England,[3] and any other country where donor eggs or embryos are utilized.

Of at least as much interest to protecting parents and children, as well as the integrity of the artificial reproduction techniques themselves, is vigorous opposition to the commercialization of these techniques. The goal is to prevent children from being viewed as commodities that can be purchased, sold, returned, and exchanged.

The argument in relation to the purchase and sale of blood is well known to most public health workers, but continues. Richard Tittmuss, the eminent British sociologist, has suggested that outlawing the purchase and sale of blood contributes to altruism in society by refusing to put a price on a priceless "gift", and that this is a good thing for all concerned.[12] Few people argue against altruism, but his parallel case that the purchase and sale of blood leads to an undersupply and an inferior product is in dispute.[13,14] Some have argued that since we permit the purchase and sale of blood in the US, and sperm in both the US and the United Kingdom (but not in Australia), we should also be willing to permit the sale of embryos and the "leasing" of wombs (by surrogate mothers to gestate children genetically related or unrelated to themselves). The counterarguments are that selling of these two bodily fluids is a mistake, and we should not compound it by permitting other body parts or products to be sold; and that an embryo is more than the sum of its parts.

The United States

In the US, frozen embryos are only used for IVF at one major medical center (University of Southern California) and there has been no public policy developed on the issue of sale or donation of unused embryos.[5] Two related issues, however, have received some attention: surrogate motherhood and surrogate embryo transfer (SET). The surrogate mother scenario involves hiring a woman who agrees to be impregnated artificially by the sperm of the husband member of an infertile couple, and to bear a child that she will later

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either give up for adoption to them or relinquish her parental rights in. Many interesting contract questions are raised by this technique,[15] but the concern here is with the commercialization of childbirth. Should the surrogate mother be paid for her "services" or is payment in this case so close to payment for the child that it amounts to "baby selling"? States which have statutes that prohibit "black market adoptions" forbid payment to the mother on the theory that it unduly influences her to give up her child and turns the child into a commodity. The Michigan courts, the only ones to rule directly on the question, have held that these statutes prohibit the payment of surrogates as well.[15] In Kentucky, however, a court has held that the adoption statutes do not prohibit a woman from relinquishing her parental rights in the child for money (after the mother relinquishes her rights, the only legal parent is the father, who then gets custody of the child; later his wife may adopt the child through a step-parent adoption procedure).

Up to a few months ago, the standard rate for a surrogate mother was $10,000. This seemed low enough to many commentators to assure the appearance that what was actually happening was "womb rental" or payment for "uterine services," not payment for the baby itself. In the September issue of *Boston Magazine,* however, two advertisements appeared that may portend the future. One was from a couple and their attorney offering $50,000 to a 22–35 year old surrogate who was "tall, trim, intelligent, and stable."[16] The other was from a "young, beautiful, intelligent" woman with a "very healthy genetic background" who offered her services as a surrogate mother for $125,000, for which she would "produce a beautiful child especially for you."[16] Obviously both the parents in the first ad and the surrogate in the second are seeking a particular type of child. What happens if their expectations are not fulfilled? In one recent case, a surrogate bore a child with microcephaly.[15] Neither the contracting husband nor the surrogate wanted the child. Tissue typing later proved it was the genetic child of the surrogate and her husband, and a lawsuit against the physician and the lawyer involved in the arrangement is reportedly being pursued.

Surrogate embryo transfer is a much newer procedure and only currently offered at UCLA-Harbor Hospital.[1] Its developers have, however, sought a process patent on the SET procedure, and envision licensing clinics across the country to offer it at approximately $14,000 for the first three attempts. While the notion of patenting a medical procedure is not completely new, it has provoked controversy, and raises serious problems regarding invasion of privacy in policing the patent in the clinic, and conflict of interests in providing access to information for quality control and in reporting results in both the lay press and professional literature.[5,17]

England

There have been a number of previous reports by commissions on AID in England, but the most comprehensive report on "human assisted" reproduction techniques by a government-sponsored commission, was by one chaired by Dame Mary Warnock. The July report makes 63 specific recommendations: 33 involving a proposed licensing board to regulate clinical services and research, seven involving the National Health Service's infertility program, and 23 for new British laws, including proposals to create seven new crimes.[3] This is legal overkill, since it is at least premature to outlaw as criminal so many aspects of assisted reproduction. The Warnock Commission, for example, proposes outlawing all aspects of surrogate moterhood:

> "Legislation should be introduced to render criminal the creation or the operation in the United Kingdom of agencies or the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wish to utilize the services of a carrying mother; such legislation would be wide enough to include both profit and non-profit making organizations.
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> "Legislation should be sufficiently wide enough to render criminally liable the actions of professionals and others who knowingly assist in the establishment of a surrogate pregnancy.
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> "It be provided by statute that all surrogacy agreements are illegal contracts and therefore unenforceable in the courts."[3]

As one commentator has already noted, "this seems not entirely to deal with realities."[18]

The Commission was also upset about payment to sperm donors, ovum donors, and embryo donors, but adopted a much more cautious approach. It recommends legislation be "enacted to ensure there is no right of ownership in a human embryo," but stops far short of suggesting that the purchase and sale of genetic materials be outlawed, apparently because it believes such a move would threaten the sperm supply for AID. Accordingly, its official recommendation is that the "*Unauthorized* [by the state licensing agency] sale or purchase of human gametes or embryos should be made a criminal offence."[3] The Commission does not suggest what guidelines the licensing commission should adopt, or if it should become involved in price-setting for embryos and gametes. This matter demands more attention.

Australia

Surrogate motherhood is not, apparently, used in Australia and opinion is strongly against its commercial use.[4] On the other hand, Australia has most of the world's experience with frozen embryos, and not all of it has been uncontroversial. Well known, for example, is the case of Mario and Elsa Rios, the California couple who died in a light plane crash in Chile in 1983, leaving two frozen embryos in an Australian IVF clinic. An international debate concerning the fate of these embryos ensued.[19] The Waller Commission, which had previously recommended that the general ban on the purchase and sale of human body parts in Australia continue to apply to sperm, ovum, and embryos, was asked to reconvene to determine the fate of the Rios' embryos. In early September 1984, their report was made public by the Office of Attorney General James Kennan, of the State of Victoria. It recommended that in the absence of specific instructions from the gamete donors, frozen embryos in storage should be destroyed upon the death of the gamete donors.[20] This seems completely sensible, since any other decision would permit some third party to dispose of the embryo as it saw fit: treating human embryos like unclaimed luggage. This rejected solution was adopted by the Warnock Commission, which recommended that the storage facility determine the fate of unclaimed embryos.[3]

How should we deal with surrogacy and frozen embryos?

Surrogate motherhood has enough potential legal and personal problems surrounding it that it is unlikely to ever

become popular unless laws are developed that encourage it by clarifying its legal status. Since commercial surrogacy seems to create more problems that it might possibly solve, such laws should not be passed. On the other hand, there should be no legal objection to a friend or relative acting as a surrogate mother out of love or compassion: such a gift would remain priceless and such altruism should not be made criminal. Likewise, embryos can be donated, but commerce in them should be prohibited.

There is an almost universal consensus that kidneys should not be bought and sold, and the arguments against the sale of human embryos are even more compelling. A commercial market in prefabricated, selected, embryos would encourage us to view embryos as things or commodities that are simply a means to whatever ends we design, rather than as human entities without a market price. Ian Kennedy has argued that we know intuitively that a human embryo is more valuable than a hamster or other experimental animal, and that is why we have trouble permitting experiments on human embryos.[21] Likewise, we know intuitively that a human embryo is more "valuable" than a kidney and of much more symbolic importance regarding human life: that is why we feel that embryos should not be subject of commerce.

Embryos, like babies from surrogate mothers, will be bought and sold, if at all, on the belief that they will produce a healthy child, and possibly one of a certain physical type, IQ, stature, and so on. When the child is not born as warrantied or guaranteed, what remedies will the buyer have against the seller? Even a brief glance at the sales provisions in the Uniform Commercial Code (UCC) informs us that this is not an area in which we can permit sales, or if we do permit them, it is an area in which we need a new set of sales statutes.

The UCC provides, for example, that "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest" (sec. 2-601). Section (c) might be read to apply to twins or triplets, and section (a) leaves us wondering who is responsible for the child. Likewise, "if the seller gives no instructions within a reasonable time after notification of rejection, the buyer may store the rejected goods for the seller's account, or reship them to him, or resell them for the seller's account . . ." (sec. 2-604) This could be read as applying more directly to the frozen embryo itself, but its potential application to the child produced as a result of the embryo transfer process simply illustrates the inappropriateness of sales in this area at all, and the ease with which the *sale of human embryos can quickly become confused with sale of human children.*

Conclusions

Action on three levels is warranted: 1) a model state law designed to clearly define the identity of the legal mother and father of all children, including those born to other than their genetic parents, and outlawing the sale of human embryos, should be drafted and enacted; 2) professional organizations, with public participation, should develop and promulgate guidelines for sound clinical practice; and 3) a national body of experts in law, public policy, science, medicine, and ethics should be established to monitor developments in this area and report annually to Congress and the individual states on the desirability of specific regulation and legislation.

At all levels, the primary focus should be on protecting the interests of the children, even if their protection sometimes comes at the expense of some infertile couples. This general policy will also protect the integrity of artificial reproduction itself.

REFERENCES

1. Bustillo M, Buster JE, Cohen SE, *et al:* Nonsurgical ovum transfer as a treatment in infertile women: preliminary experience. JAMA 1984; 251:1171–1173.
2. New York Times, April 11, 1984; A16.
3. Dept of Health and Social Security: Report of the Committee of Inquiry into Human Fertilization and Embryology, London, July 1984.
4. The Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization (Louis Waller, Chairman), Report on the Disposition of Embryos Produced by In Vitro Fertilization, Victoria, Australia, Aug. 1984.
5. US House of Representatives: Hearings on the Extracorporeal Embryo before the Investigations and Oversight Subcommittee of the Committee on Science and Technology, August 8–9, 1984. Washington, DC: Govt Printing Office, 1984.
6. People, March 5, 1984; 73.
7. Mason, S: Abnormal Conception, 56 Australian Law J. 347 (1982).
8. The Economist, July
9. Grobstein C, FLower M, Mendeloff J: External human fertilization: an evaluation of policy. Science 1983; 222:127–133.
10. Annas GJ: Redefining Parenthood and Protecting the Embryo: Why we need new laws. Hastings Center Report, October 1984; 21–22.
11. Robertson JA: Procreative liberty and the control of conception, pregnancy, and childbirth. Virginia Law Rev 1983; 405–464.
12. Tittmuss R: The Gift Relationship. London: Allen and Unwin, 1969.
13. Drake AW, Finkelstein SN, Sapolsky HM: The American Blood Supply. Cambridge: MIT Press, 1982.
14. Hagen PJ: Blood: Gift or Merchandise. New York: Alan R. Liss, 1982.
15. Annas GJ, Elias S: *In vitro* fertilization and embryo transfer: medicolegal aspects of a new technique to create a family. Family L Q 1983; 17:199–223.
16. Boston Magazine, September 1984; 294.
17. Annas GJ: Surrogate Embryo Transfer: the perils of patenting. Hasting Center Report, June 1984; 25–26.
18. Wells WT: Warnock report on human fertilization and embryology. Lancet 1984; 2:531–532.
19. Time, July 2, 1984; 68.
20. New York Times, Sept. 4, 1984; C6.
21. Kennedy I: Let the law take on the test-tube. London Times, May 26, 1984; 6.